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April 28, 2025

Contra Costa County Board of Supervisors  
c/o Everett Louie  
30 Muir Road  
Martinez, CA

Subject: CDLP23-02046 Appeal of Land Use Permit Approval for RCFE Facility in R-10  
Zoning District; Appeal from Planning Commission Action April 23, 2025 – 3-2 Vote

Dear Members of the Board of Supervisors:

I represent Joshua Eckhaus and Jennifer Ostrander – and others of their Warren Road neighborhood. Joshua and Jennifer reside at 2370 Warren Road in unincorporated Walnut Creek. Their property is immediately adjacent to a portion of the Carnelian, a Residential Care Facility for the Elderly (RCFE). The Carnelian operates its RCFE from buildings and improvements spread across and over three separate and distinct legal parcels – commonly designated as 2374 and 2380 Warren Road and 170 Flora Avenue. All three parcels are owned by Carnelian Holdings, LLC,. Despite the three separate parcels, The Carnelian is operated and administered as a single facility. It represents itself to the public as a single entity with amenities shared amongst all of its residents regardless of the particular unit to which each might be assigned. In fact, the three parcels cannot be operated independently as they share resources and centralize operations, including a main kitchen and common areas. An example of but one project amenity housed on a single parcel but available to all residents is “Grandma’s Garden”, located at 2374 Warren Road. According to the Carnelian, Grandma’s Garden is a critical amenity widely enjoyed by all of its residents.

At present, The Carnelian houses 30 residents within its facility. (The “facility” is necessarily inclusive of the entire operation and is not limited to isolated improvements on a single parcel since none of the improvements on a parcel by parcel basis could actually function independently.) It has filed this application for a land use permit to increase that capacity by 12 additional residents. To house the additional residents, The Carnelian proposes to construct a new two story building at 2374 Warren Road – immediately adjacent to the private back yard that Joshua and Jennifer currently enjoy. In a very real sense, the development/expansion

proposal will negatively impact my clients' use and enjoyment of their own version of "Grandma's Garden".

As filed, the land use permit application is curiously misleading. It expressly pertains to only one of the three parcels owned by Carnelian Holdings, LLC – and thus to only a portion of the facility. The increase in capacity remains at 12 residents; however, the increase is characterized as an increase from 6 existing residents to 18. Because the application pertains to only one of three parcels which together comprise the entire RCFE, the location and design of project improvements are constrained and project alternatives are generally unavailable. The size and configuration of the parcel and the existence thereon of Grandma's Garden impose limitations in terms of development and the construction of additional housing. Had the entirety of the RCFE facility been the subject of the land use permit application, alternative development plans might have been pursued and the impacts on neighbors and the neighborhood mitigated. Moreover, a variance request that is presently a part of the filing and application is probably avoidable if alternative designs inclusive of the entire facility had been considered.

The point of the pending Carnelian application is to increase resident capacity. The manner in which that might be done is the subject of the land use permit to be issued at the discretion of this Board of Supervisors. The issue is not whether or not The Carnelian provides a community service related to elderly care. It is how best to further a common goal to provide residential elderly care while mitigating the impacts of required development so as to make the resulting project most complementary to the existing neighborhood and zoning district. It also requires a balancing of interests of neighbors with the concerns for proper care.

The Carnelian application was first heard by the Zoning Administrator. After initial hearing, the applicant was encouraged to meet with neighbors and seek a compromise solution to the proposed expansion of capacity for which the application had been filed. While it is true that the Carnelian "tweaked" various design elements of the application, there was no substantive response to neighbor attempts at a dialogue. The ZA approved the Carnelian application subject to conditions. An appeal to the Planning Commission resulted in further conditions to the application – but also resulted in an approval on a split vote of 3-2.

There are two independent means by which the Carnelian application for an increase in capacity can be fully satisfied – with the support and acquiescence of the neighborhood. Neither of the two approaches imposes a material burden on the Carnelian. Frankly, there is no apparent reason to approve an application that unnecessarily changes the look and feel of the neighborhood, requires the grant of a variance, and is opposed by virtually all neighbors when other solutions permissive of a harmonious resolution are available.

### **The Carnelian Can Construct An Additional Facility On Its Targeted Parcel – Despite Available Alternatives In a Fashion that Neighbors Can Support**

My clients and their neighbors do not oppose the requested increase in capacity sought by The Carnelian as long as the means of increased capacity are consistent with code requirements and required findings can be made. They do not believe that the required findings pertaining to

the present application can be made; they have proposed an alternative approach which, unfortunately, has been uniformly rejected by the project applicants.

The Warren Road neighborhood is not a transitional neighborhood. Even a casual review of neighborhood context will reveal that Warren Road is home to traditional single family detached homes. The Carnelian is the lone exception. However, its presence on Warren Road is relatively understated and the buildings fronting the street appear roughly consistent with the neighboring homes in terms of scale, look and feel. The property parcel at the intersection of Flora Avenue and Warren Road is single family in use. Flora Avenue can be characterized as a transitional neighborhood. Thus, Flora Road connects Boulevard Way – a true commercial street – with Warren Road. Flora Avenue is host to multi-family uses, and at least one condominium project as it leads to the retail and commercial uses found on Boulevard Way. The same two story construction proposed for the Warren Road parcel might be quite consistent with neighboring properties if viewed from Flora Avenue; it represents a true departure from the look and feel of the residential neighborhood which constitutes Warren Road.

Project neighbors have proposed a single story construction for purposes of adding the desired capacity for residents. The Carnelian has rejected such a single story proposal on the grounds that it needs/wishes a capacity increase of 12 residents and a single story solution would only yield 8 additional residents. A 2 story building housing elderly residents requires an elevator and two staircases – for fire and other purposes. A single story building would be far more efficient and would normally cost less to construct. The real issue is whether or not any alternatives exist from which units for 4 additional residents might be created in a single story development.

The Carnelian has argued that its 12 resident capacity would be restricted to only 8 if it was restricted to but a single story building – despite the advantages of eliminating an elevator and two stairwells. That restriction is voluntary, unilateral and unrelated to physical site conditions, however. In fact, the restriction in developable area which would purportedly restrict a single story facility to only 8 residents is due to The Carnelian insistence on preserving and maintaining its Grandma's Garden as an amenity for its residents. However, it requires no special expertise to conclude that a garden can be easily re-located and re-created with new and similar plantings in the face of higher and better use and need. There is obviously no entitlement to a two story building; furthermore, there is no entitlement to the maintenance of a garden which would then compel construction of a two story building – which negatively impacts the use and enjoyment of neighboring properties. Ordinarily, a party requesting an intensification of use and expansion of development must mitigate the impacts of its plans on surrounding properties. In this particular instance, it is the applicant party that wishes to over burden neighboring properties by construction related to an intensification of use made necessary by its unilateral desire to preserve its own existing amenities. This is the exact opposite of what is typically required of developers – who are routinely required to compromise their plans for their own properties as they mitigate the impacts of their development on neighbors.

The Carnelian owns three contiguous parcels and operates as a single facility. It strains credulity to insist that a two story commercial building must be constructed with impacts on neighbors and the neighborhood – because Grandma's Garden must be preserved as is in its

current location. Obviously, that garden could be easily relocated and reconstructed elsewhere within the three parcel facility – and the desired expansion in capacity could then be accommodated by a single story residential-type building which might be of sufficient size due to an expansion into the present location of the garden.

This Board is charged with the task of balancing the interests of all parties impacted by the approval or denial of the requested land use permit. The Carnelian provides a useful service to the community – but with impacts related to a use that is not entirely compatible with the surrounding single family neighborhood. Hence the requirement for a land use permit. An increase in capacity is sought. The Carnelian would have this Board believe that it can satisfy its capacity requirements solely by means of the present application. That is simply not true. The minor compromise of relocation of a garden amenity could permit expansion by single story development. Alternatively, a two story construction can be accommodated; however, by means of a different development than that which has been proposed. This Board is not required to solve the issue of where and how Grandma's Garden might be resurrected elsewhere on the facility site. It need merely condition any approval it might grant on the construction of a single story building capable of housing the desired expansion in capacity. By so acting, this Board might demonstrate the fact of its balancing of interests and considerations for the benefit of both the applicant and the neighborhood.

### **The Carnelian Can Construct a Two Story Building to Increase its Capacity**

The Carnelian operates as a single facility across three separate legal parcels – all under common ownership. There are not three separate and independent projects; rather, the residents assigned to one unit on one parcel have the use and enjoyment of numerous common features of the entire facility. Despite the foregoing, the Carnelian has filed a single application for land use permit as to only one of its three parcels. Similarly, Staff has isolated its investigation and recommendations to only the single parcel at 2374 Warren Road – while the actual facility, inclusive of all residents, buildings, and amenities has been ignored. Both The Carnelian and Staff have deemed any consideration of offsite development to be outside the scope of its application.

The present application is artificial and misleading in its request for a land use permit for a capacity increase in an RCFE which is limited to a constrained portion of a much larger facility of which the particular lot to be developed is only a part. Piecemeal planning of development is never a good idea. The Carnelian consists of a single facility that happens to span three parcels of real estate under common ownership and operation. The increase in capacity is as to the entirety of the facility – not just to the single parcel on which a new two story building is to be constructed. The land use permit is best considered in the context of the complete RCFE facility – inclusive of its present and future needs and operations.

Required findings for approval of a land use permit include the following: (i) That the proposed project shall not adversely affect the orderly development within the County or the community; (ii) that the proposed project shall not encourage marginal development within the neighborhood; and (iii) that special conditions or unique characteristics of the subject property and its location or surroundings are established. The Staff Report would argue that these

findings can all be made because (i) the proposed use is an expansion of pre-existing use of many years standing; (ii) the proposed use is regulated and thus unique; and (iii) the parcel is transitional in the sense that multi-family uses and commercial/retail uses are beginning to predominate over traditional residential single family uses.

My clients, their neighbors, and I would all agree that findings to justify a land use permit might be made – but not the findings required to approve the particular land use permit for which this application has been filed.

A land use permit is a permit issued to a landowner by an administrative agency allowing a particular use or activity not allowed as a matter of right within a zoning district. In *Upton v. Gray* (1969) 269 Cal App 2d 352, 357, the court described the purpose of a conditional land use permit to be the following: “The device of providing for the issuance of a special use permit is well recognized as a legitimate zoning procedure. It permits the inclusion in the zoning pattern of uses considered by the legislative body to be essentially desirable to the community, but which because of the nature thereof or their concomitants (noise, traffic, congestion, effect on values, etc.), mitigate against their existence in every location in a zone, or any location without restrictions tailored to fit the special problems which the uses present.”

Obviously, there is no entitlement to approval of a land use permit – whether or not conditioned. *Wesley Investment Co. v. County of Alameda* (1984) 151 Cal App 3d 672. The issuance of a land use permit is not a matter of legislative discretion; rather it is quasi-adjudicative in nature and must be supported by specific findings which in turn are supported by substantial evidence. *Essick v. City of Los Angeles* (1950) 34 Cal 2d 614, 622.

The Staff Report is incorrect in its description of the “neighborhood” as transitioning from traditional single family residential to multi-family, retail and commercial uses. Warren Road is a very traditional single family residential neighborhood – but for the portion of The Carnelian that adjoins that street. As to that portion, the present project appearance is residential in type and scale of development. Had the Staff Report directed its “transitional” comment to the portions of Carnelian that enjoy street frontage on Flora Avenue, its application might be deemed far more appropriate. Flora Avenue connects Boulevard Way to Warren Road. There are obviously a number of multi-family projects in that area which connects to the commercial uses found on Boulevard Way. None of the aforesaid uses are found on Warren Road.

The Staff Report suggests that approval of the requested land use permit would not adversely affect orderly development or lead to marginal development due to the regulated nature of the business being conducted from The Carnelian facility. However, the referenced regulatory authority has no jurisdiction or concern over land uses. This Board cannot defer its responsibility to make findings on land use issues by default to another jurisdiction with different regulatory authority having no role in land use considerations. Staff and the project applicant have framed the land use permit issue as one that involves but a single parcel of constrained property as to which there is no viable alternative to the two story construction project presently under consideration. This approach fails to consider The Carnelian as a single facility to be developed in its entirety in the best fashion to balance zoning district and neighbor requirements with the special uses it might need. Approval of this land use permit would in fact cause the

adverse affects on orderly development and marginal development that making the correct required findings is intended to avoid.

As the neighbors have argued, there is ample room within the Carnelian facility to construct a two story building to increase resident capacity in the vicinity of the common boundary line with the condominium parking lot accessed from Flora Avenue – a true transitional neighborhood. A new two story building would preserve Grandma’s Garden as a facility amenity in unchanged form for the foreseeable future. A two story building placed in close proximity to the parking lot of a large condominium project would have no discernable impact on that neighbor – while fully accommodating the capacity increase for which this application has been filed. Nonetheless, the Carnelian has absolutely refused to consider this alternative development proposal.

There is, in fact, only one reason to ignore this alternative site for development. That would be its potential for housing some future additional increase in capacity based on one or more future and additional land use permit applications. It is basic planning that any proposed project must be evaluated not merely on its own merits but with respect to the cumulative impact that future development might create. The increase in resident capacity is a Carnelian issue – not a single parcel issue. The overall development plan for The Carnelian in its entirety should have been considered by Staff in measuring the particular proposal against the broader findings requirements imposed by County ordinance. The land use permit must apply to the entirety of The Carnelian – not simply to a portion of that facility.

It is noteworthy that HGCI, the Carnelian Contractor/Consultant reported to Staff regarding its meeting with neighbors in a letter dated October 2, 2024 and remarked expressly that “...The maximum beds the Carnelian team can accommodate is 18 beds to alleviate the current housing demand and needs (the owners and staff would like to add more but it will burden the owners and their staff beyond their resources available at this time.)” (Emphasis added) The application focus on but one parcel of three comprising the Carnelian for purposes of increasing resident capacity has created a false dialog in which constraints are deemed acceptable and alternatives have not been investigated – while future development plans and their potential impacts have not even been considered. A cynic might well surmise that The Carnelian’s actual intent has been to push expansion on the particular parcel as the only solution to a constrained parcel – and then at a later time to propose further expansion(s) on a per parcel and piecemeal basis, while arguing in each instance that each increase in capacity and density can be separately justified. Such an approach to the land use permitting system would undermine its very purposes.

It is not possible to make the required findings in support of the land use permit as presently characterized. In addition, the present application requires a variance which is unnecessary if the constraints of the single parcel and its proposed development are expanded by the review of the entirety of the facility.

The law has long advocated for the consideration of substance over form. The substance of this application is an increase in resident capacity at The Carnelian. The form is a new proposed and localized two story structure selected to avoid impacts on Grandma’s Garden, with

parking issues and a variance requirement. The substance of a planned increase in capacity can be reconciled with the preservation of a Grandma's Garden and the avoidance of impacts on the neighbors' own garden and back yard spaces. The form of the substantial issues can be addressed in either of two distinct forms. One would relocate Grandma's Garden and build a single story structure at 2374 Warren Road. The precise form and manner of relocation would be up to The Carnelian; however, this is something easily addressed – and surely the Garden cannot be so limited in purpose and function that a relocation and redesign cannot be accomplished. The second form in which the substantial issues can be addressed is the placement of the planned two story building at the facility common boundary line with the adjoining condominium parking lot. Either alternative would satisfy substantive requirements in forms that the neighbors can support and the Carnelian should find satisfactory.

My clients and their neighbors recognize that The Carnelian has provided a useful community service in terms of elderly care. They do not object to an increase in capacity that has been designed to meet their concerns and ordinance requirements. They very much object to the manner in which this application has been considered and processed. They feel that this Board cannot make the required findings on the strength of this application, but that a substantively complete application with construction alternatives could lead to an approval consistent with zoning and use permit requirements. Accordingly, it is respectfully requested that this application for a land use permit be denied.

Very truly yours,

  
David J. Bowie